No. 3545

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CINCINNATI DISTRIBUTING COMPANY (a corporation),
Plaintiff in Error,

vs.

SHERWOOD & SHERWOOD COMMERCIAL CO. (a corporation),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

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BRIEF FOR DEFENDANT IN ERROR

This action was commenced in the District Court by plaintiff in error to recover the sum of five thousand two hundred and seventy-two dollars and seventy-five cents ($5272.75) which is claimed by plaintiff in error as damages for breach of the contract for the sale and delivery of merchandise described in the complaint. Defendant below, defendant in error here, made a motion for non suit, which was granted. This ruling of the Court and the judgment which followed it are the errors complained of herein.

In view of the fact that plaintiff in error here was plaintiff below, and that defendant in error here was defendant below, we shall hereafter refer to the parties by the names of plaintiff and defendant.

Defendant has no criticism to make of the statement of facts set out by plaintiff in its brief. In view of the fact that plaintiff's Exhibits 1, 2 and 3 are the key to the solution of the questions presented on this appeal, we shall print herein these exhibits *in extenso.*

It will be noticed that Exhibit 1 is a telegram sent by S. L. Hellman to the Cincinnati Distributing Company on the 13th day of March, 1918, and that it reads as follows (Trans. p. 15):

> "The Cincinnati Distg. Co.,
> Cincinnati, O.
>
> Sherwood will sell hundred spring fourteen hundred fall fourteen Old Taylor. If you want in addition to Melczer purchase believe one thirty five for fourteen one thirty two half for thirteen less commission would buy. Wire fast message either way. Offer less draft through Muellenkamp or any direct buyer.
> (Signed) S. L. Hellman."

That at noon of the following day the said S. L. Hellman received in reply to his telegram, Exhibit 1, Exhibit Number 2 (Trans. p. 16):

"Cincinnati, O., Mar. 14, 1918.
Sidney L. Hellman,
Cr. Vannuys Hotel,
Los Angeles, Calif.

Buy Sherwood Taylor at prices your wire or better. Fall thirteens spring fourteen. Wire quick.
(Signed) CINCINNATI DISTRIBUTING CO."

That according to the testimony of witness Hellman, the deal for the sale of the whiskey was concluded between him and the defendant subsequent to the sending and receipt, respectively, of said Exhibits 1 and 2. That Exhibit 3, which is as follows (Trans. p. 16):

"Los Angeles, Calif.,
Mar. 14, 1918.
The Cincinnati Distributing Co.,
607 Traction Bldg.,
Cincinnati, O.

Bought ninety nine each fall thirteen spring fourteen Taylor. One thirty two half thirty five less commission.
(Signed) S. L. HELLMAN."

was sent by Hellman to the Cincinnati Distributing Company.

Hellman's testimony with regard to the sending of the said Exhibit 3 is set forth in the transcript at pages 12 and 13. We copy here that portion of the testimony which is set out by plaintiff on pages 2 and 3 of its brief, as follows:

"I called Mr. Lieb up over the telephone at 4 o'clock. He told me he had concluded to let

> me have the goods at $1.35 per proof gallon, less charges and commission. I then informed him that I would not purchase it at that price because I had purchased goods of similar description with a difference of 5 cents per gallon between the 13 and 15 ages, but that in this instance I was willing to take them at a difference of 2½ cents and offered him $1.32½ for the 'fall of 1913' and $1.35 for the 'spring of 1914.' After a moment's hesitation, he said 'very well, I will take it,' and I said immediately 'I wish you would wire confirmation to our Cincinnati office,' and he replied, saying 'I am ready to leave the office. There is some one waiting for me and I cannot take the time. Will you make this confirmation yourself for me? . . . . After this conversation, I immediately wired confirmation to the Cincinnati Distributing Company of this lot of whiskey."

It will be noticed that this entire conversation, as claimed by the witness Hellman, took place over the telephone; and that there was no writing involved in it in any manner.

Counsel for plaintiff concedes that there is but one question involved in this case, namely, the "applicability of the statute of frauds." In this regard plaintiff makes two points; the first is that Exhibits 1, 2 and 3 constitute when construed together a valid memorandum under the statute, and the second point, that irrespective of whether or not a valid memorandum exists in the case, that defendant is estopped from pleading the statute of frauds because of an alleged change of position on the part of plaintiff.

ARGUMENT

Defendant makes and will demonstrate herein the following propositions:

1. That the Statute of Frauds is properly an issue herein under the pleadings.

2. That Exhibits 1, 2 and 3 do not and cannot constitute a valid memorandum under the Statute of Frauds.

a. That the authority of Hellman to bind by the sending of Exhibits 1, 2 and 3 or any of them was in parol and is invalid under Section 2309 of the Civil Code of the State of California.

b. That the principle of Brewer vs. Horst (127 Cal. 643) is inapplicable to the case at bar.

c. That Exhibit 3 does not comply with the requirements of a valid memorandum under the statute.

3. That defendant is not estopped from pleading the Statute of Frauds.

1. That the Statute of Frauds Is Properly an Issue Herein Under the Pleadings.

The complaint (Par. III, Trans. p. 1) sets up a contract of sale and purchase. The answer (Par. III, Trans. p. 4) specifically denies the execution of said contract.

To the introduction of the Exhibits 1, 2, 3 and 4 (Trans. p. 15) defendant objected as follows:

> "To the introduction of said exhibit, as well as Plaintiff's Exhibits 2, 3 and 4 hereinafter set forth, defendant objected on the ground that said exhibits, and each of them, were irrelevant, incompetent, immaterial, hearsay and insufficient to constitute a valid contract or memorandum thereof under the statute of frauds."

A denial of the execution of a contract permits of the objection that the contract is within the terms of the statute of frauds.

Tierney vs. *Howard,* 79 Cal. 525;

Walsh vs. *Standard,* 174 Cal. 807.

2. That Exhibits 1, 2 and 3 Do Not and Cannot Constitute a Valid Memorandum Under the Statute of Frauds.

a. That the authority of Hellman to bind by the sending of Exhibits 1, 2 and 3 or any of them was in parol and was invalid under Section 2309 of the Civil Code of the State of California.

The testimony clearly shows that all of the alleged conversation between Hellman, representing the plaintiff, and Lieb, representing the defendant, was over the telephone.

Counsel for plaintiff state in their brief, page 6:

> "The testimony in this case is that Mr. Hellman was authorized by Mr. Lieb to send the telegram and for that purpose he was the agent of defendant in error and the telegram sufficiently sets forth the transaction to take it out of the operation of the statute of frauds."

We reply:

> "An oral authorization is sufficient for any purpose except that an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing."
>
> *Civil Code,* Sec. 2309.
>
> "The following contracts are invalid, unless the same, or some note or memorandum

thereof, is in writing and subscribed by the party to be charged, or by his agent:

4. An agreement for the sale of goods, chattels or things in action, at a price not less than two hundred dollars....."

Civil Code, Sec. 1624.

"No sale of personal property, or agreement to buy or sell it for a price of two hundred dollars or more, is valid, unless:

One. The agreement or some note or memorandum thereof be in writing, and subscribed by the party to be charged, or by his agent."

Civil Code, Sec. 1739.

The Supreme Court of the State of California was considering the authority of a husband to bind his wife in a certain exchange of real property. The Court uses the following language in connection therewith:

"When plaintiff Arthur Mason contracted to make the exchange the property was the separate property of his wife, Ada. The only authority he had to deal with it was oral, and in law was no authority at all. *(Civil Code* secs. 1624 (subdivision 5), 2309. *Salfield* vs. *Sutter County, etc. Co.,* 94 Cal. 546.)"

Mason vs. *Lincle,* 143 Cal. 363, 366.

The Supreme Court had before it in the case of *Seymour* vs. *Oelrichs* (156 Cal. 782) a question of the oral authorization of an agent to bind his principal to a contract, which under the statute of frauds must itself be in writing. In the Seymour

case, *supra,* the contract involved was that of the employment of a person for a period of more than one year. The Court uses the following language:

> "It is claimed by the appellant that the record contains no evidence showing any authority on the part of either Charles L. Fair or Herman Oelrichs (the alleged agents) to bind Mrs. Oelrichs and Mrs. Vanderbilt (the alleged principals) by any such contract as found by the Court. We think this contention is sound and must be sustained. The contract was one which, as we have seen, was required to be in writing, and under Section 2309 of the Civil Code 'an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing.' (*Mason* vs. *Lincle,* 143 Cal. 363.)"

Seymour vs. *Oelrichs,* 156 Cal. 782, 788.

This proposition is in itself conclusive of the argument that Exhibits 1, 2 and 3 constitute a valid memorandum under the statute of frauds.

b. That the principle of Brewer vs. Horst (127 Cal. 643) is inapplicable to the case at bar.

If we were to assume for argument's sake that Mr. Hellman had a valid authority to bind the defendant in the case by the sending of the telegrams (a proposition which we have conclusively shown to be incorrect) we would be brought to a consideration of plaintiff's argument that the three exhibits should be considered as one.

For the purpose of this argument plaintiff has cited *Brewer* vs. *Horst,* 127 Cal. 643. The facts

of *Brewer* vs. *Horst* were as follows: Brewer was a hopgrower and Horst and Lachmund Company was a firm with headquarters in Santa Rosa, State of California. The transactions in question occurred at Sacramento. An oral contract was entered into between one Wagner, the agent of Horst and Lachmund, and Brewer for the sale of certain hops. Before the entering into of this contract Wagner had taken samples of the hops and had marked the samples by the trade symbol "13;" that after the consummation of the oral transaction, Wagner, the agent of Horst, sent a telegram from Sacramento to Santa Rosa addressed to Horst, as follows:

> "Bought thirteen at eleven five-eighths net you; confirm purchase by wire to Brewer . . ."

That in reply thereto Horst and Lachmund Company from Santa Rosa sent the following telegram to Brewer, the owner of the hops:

> "We confirm purchase Wagner eleven five-eighths cents, like sample."

The Court held that parol evidence was admissible to show the technical sense in which the word "thirteen" was used in the telegram, and that it was known to both parties to the transaction to designate a definite and certain quantity of hops. It was in connection with these specific facts that the Court used the language in its decision quoted by plaintiff on page 7 of its brief.

An examination of the facts in the case at bar shows how far removed the instant case is from *Brewer* vs. *Horst.*

According to the testimony (Trans. pp. 13 and 14) Hellman had a preliminary conversation with Lieb on the 13th of March, 1918. As a result of this preliminary conversation without any instructions, oral, written or otherwise from Lieb, Hellman sent Exhibit 1 to his house at Cincinnati. This telegram was in substance, "If you want whiskey at prices quoted, wire fast message either way." About noon of the following day, March 14th (Trans. pp. 15 and 16), Hellman received in reply plaintiff's Exhibit Number 2, which was in substance, "Buy Sherwood Taylor at prices your wire or better . . . Wire quick." These two messages were not brought to the attention of Lieb in any manner, as far as the record shows; and probably the facts were that Lieb actually had no knowledge that these two messages had ever been sent. The first two exhibits were pure hearsay, as far as the defendant was concerned. By no stretch of the imagination can it be said that a review of these two exhibits can be resorted to for the purpose of showing to the Court "all the knowledge which the parties to the transaction had at the time," for the obvious reason that there is no knowledge brought home to the defendant of the existence or the contents of said Exhibits 1 and 2.

We do not dispute the principle of law laid down in *Brewer* vs. *Horst,* but we most respectfully

maintain that it can have no application here when it sought to use the case of *Brewer* vs. *Horst* as a means of compelling the Court to resort to telegrams under the circumstances of the case at bar. All of the parties to the transaction in *Brewer* vs. *Horst* were using the word "thirteen" in a technical sense in accordance with the usage and custom of the hop trade. This usage and custom of the hop trade was proven in the case and it was merely a resort by the Court to parol testimony to interpret what would otherwise be an uncertainty in a written instrument by applying to the instrument the facts that were within the knowledge of both parties at the time of the transaction. As the Court said in that case:

> "Parol evidence is always admissible to explain the surrounding circumstances and situations and relations to the parties at and immediately before the execution of the contract, in order to connect the description with the only thing intended, and thereby to identify the subject matter and to explain all terms and phrases used in a local or special sense."

That other Courts have placed the limitation of knowledge of the parties upon the parol evidence admitted to connect documents for the purposes of the statute of frauds, see discussion in decision of Supreme Court of Massachusetts, from which we quote:

> "The old rule, by which no other paper could be used to help out the memorandum unless

incorporated into it by reference in the memorandum itself (*Morton* vs. *Dean,* 13 Metc. 385; *Boardman* vs. *Spooner,* 13 Allen 353, 90 Am. Dec. 196) is no longer followed. The connection between different papers, so that they may be considered together and their sufficiency be determined by the contents of all of them may be proved by oral evidence, *at least so far as it is the result of that evidence to establish the fact that all of the different papers which are so to be considered together were brought to the attention of both parties, and were linked together in their minds, so that the parties themselves may be found to have adopted all the papers as the expression of their purpose.* This is the effect of the recent cases. 'There is no doubt under the authorities,' said the present Chief Justice in *Lee* vs. *Butler,* 167 Mass. 426, 46 N. E. 52, 57 Am. St. Rep. 466, 'that the letter and receipt, as well as the paper containing the promise, may be used to complete the memorandum required by the statute of frauds to make the contract binding. It is also well settled that parol evidence may be introduced to show the situation of the parties and the circumstances attending the transaction, for the purpose of applying the contract to the subject matter and of showing the connection between the papers constituting the memorandum with one another.' This doctrine was applied, with a statement of both the old rule and that now followed, in *Oliver* vs. *Hunting,* 44 Ch. D. 205, in which Kekewich, J., uses this language: 'It is difficult perhaps to say where parol evidence is to stop, but substantially it never stops short of this, that whenever parol evidence is required to connect two documents together, then that parol evidence is admissible.' See *Lerned* vs. *Wannamacher,* 9 Allen 412, 416; *Freeland* vs. *Ritz,* 154 Mass.

257, 28 N. E. 226, 12 L. R. A. 561, 26 Am. St. Rep. 244; *Hibbard* vs. *Hatch Storage Battery Co.,* 174 Mass. 296, 54 N. E. 658; *Beckwith* vs. *Talbot,* 95 U. S. 289, 24 L. Ed. 496; *Cooper* vs. *Bay State Gas Co.* (C. C.), 127 Fed. 482; *Shears* vs. *Thimbleby,* 76 L. T. N. S. 709; *Camp* vs. *Moreman,* 84 Ky. 635, 2 S. W. 179; *Jenkins* vs. *Harrison,* 66 Ala. 345; *White* vs. *Breen,* 106 Ala. 159, 19 South. 59, 32 L. R. A. 127; *Strouse* vs. *Elting,* 110 Ala. 132, 20 South. 123; *Brewer* vs. *Horst & Lachmund Co.,* 127 Cal. 643, 60 Pac. 418, 50 L. R. A. 240."

Nickerson vs. *Weld,* 90 N. E. 589, 591.

As heretofore shown, this principle can have no application to the case at bar.

As will be shown in the next subdivision of this brief, the three telegrams taken together (if such were a proper mode of construction) would not contain all of the required elements of a valid memorandum under the statute of frauds.

As we have reached the conclusion that the Exhibits 1, 2 and 3 cannot be taken together, we shall now consider Exhibit 3 alone, and test its validity as a memorandum under the statute.

c. That Exhibit 3 does not comply with the requirements of a valid memorandum under the statute.

The requirements of a memorandum under the statute of frauds have been declared in many cases in the State of California. We shall quote from a few of said cases, and then point out where Exhibit 3 fails to comply with the requirements.

The Supreme Court of the State of California has said in a leading case:

> "In order to take the contract for the sale of land out of the statute of frauds, it is not necessary that there be a formal contract drawn up with technical exactness. A memorandum of the agreement is sufficient and it may be found in one or more papers, some or all of which may be telegrams. *But the memorandum must contain all the material elements of the contract; that is, it must show who is the seller and who is the buyer, what the price is and when it is to be paid, and must so describe the land that it can be identified.* (Quoting Miller, Judge, in *Grafton* vs. *Cummings,* 99 U. S. 106.)"

Breckinridge vs. *Crocker,* 78 Cal. 529, 535.

In another case before the Supreme Court of the State of California the facts were as follows: The owner of the property wrote to one Gompertz, "to try and find a purchaser for the property." Said Gompertz procured a contract for sale for $6150.00 from one Reed. The contract did not specify the name of the owner and was signed, "Center & Spader, by C. N. Gompertz, agent." Subsequent to the obtaining of the signature of Reed to this contract, said Gompertz sent a telegram to the owner as follows: "Have sold house, $6150. Wire confirmation." In reply to this the owner wired, "Terms satisfactory."

The Court said in reference to the foregoing facts:

"This evidence was sufficient to prove that there was neither a valid written memorandum of the alleged agreement of sale authorized or executed by Mrs. Mills, nor a sufficient part performance of an oral agreement to justify a decree for specific performance thereof under the rules in equity. The letter of Mrs. Mills to Gompertz merely authorized him to try to find a purchaser of the property. It did not purport to authorize him to execute any agreement for the sale thereof in her name or on her behalf. The telegram she sent from Arizona, approving the price offered, was communicated to her by the telegraph office over the telephone. Conceding that it is to be considered as having been signed by her, the two telegrams do not constitute sufficient evidence of an agreement to sell. 'The memorandum must contain all the material elements of the contract; that is, it must show who is the seller and who is the buyer, what the price is and when it is to be paid, and must so describe the land that it can be identified.' (*Breckenridge* vs. *Crocker,* 78 Cal. 535; *Meux* vs. *Hogue,* 91 Cal. 448.) The writings, taken together, do not give the name of the purchaser, do not describe the property, and do not state any of the terms of sale except the price agreed upon. They state neither the time, the terms nor the manner of payment. None of those things was ever communicated to Mrs. Mills. Her telegram approving the price cannot be deemed an affirmance of the entire contract and it did not operate to make valid the oral agreement of the persons assuming to act in her behalf."

Fritz vs. *Mills,* 170 Cal. 449, 457, 458.

We quote from a decision of the District Court of Appeals as follows:

"It is well settled that no action will lie to enforce the performance of a contract, or to recover damages for its breach, unless it be complete and certain; and the rule applies as well to price as to subject-matter and parties." *Talmadge* vs. *Arrowhead R. Co.*, 101 Cal. 367, 371, 35 Pac. 1000, 1002.

"To satisfy the statute of frauds a memorandum 'must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intentions of the parties.' 5 Browne on Statute of Frauds, 371." In *Breckenridge* vs. *Crocker,* 78 Cal. 529 (21 Pac. 179), the Court said: "The memorandum must contain all the material elements of the contract." *Seymour* vs. *Oelrichs,* 156 Cal. 782, 787, 106 Pac. 88, 91 (Am. St. Rep. 154).

Wineburgh vs. *Gay,* 27 Cal. App. 603, 605, 150 Pac. 1003, 1005.

The same rules have been affirmed by many other California cases, among which are the following:

Hines vs. *Copeland,* 23 Cal. App. 36, 40, and *Albion Lumber Co.* vs. *Lowell,* 20 Cal. App. 782.

Exhibit 3 is in its essential terms as follows:

"The Cincinnati Distributing Co.

.....

Bought ninety-nine each fall thirteen spring fourteen Taylor one thirty-two half thirty-five less commission."

Applying the test of *Breckenridge* vs. *Crocker, supra,* and the other cases, we very clearly see that

this telegram does not comply with the essential requirements of a memorandum. The requirements set forth in the Breckenridge case are as follows:

First, who is the seller? As to this question the telegram, Exhibit 3, is completely silent.

Second, who is the buyer? It may possibly be presumed from the fact that the telegram is addressed to the Cincinnati Distributing Company, that the Cincinnati Distributing Company is intended as the buyer, and it might be said that it is a compliance with that requirement.

Third, what is the price? The telegram says, "one thirty-two half thirty-five less commission," without any specification as to whether one thirty-two and a half is dollars or cents or applies to barrels or to gallons of whiskey, with the same criticism concerning thirty-five, and without any specifications as to what the commission referred to is.

Fourth, when is the price to be paid? The telegram is entirely silent.

Fifth, the memorandum must so describe (the land, in the Breckenridge case) the merchandise in the instant case that it may be identified. Exhibit 3 contains the words, "bought ninety-nine each fall thirteen spring fourteen Taylor." The telegram does not state whether the ninety-nine means gallons or barrels, or what quantity, nor is there any evi-

dence in the record showing what was meant by the word "ninety-nine."

Applying the foregoing tests, it is very apparent that plaintiff's Exhibit 3 does not constitute a sufficient memorandum.

As referred to in a previous subdivision of this brief, even if for argument's sake, we were to agree that Hellman had the authority to send the telegrams and bind the defendant herein, and if we were to further concede the fact that the three telegrams should be construed together, it will be very plainly seen that even the three telegrams together do not constitute a sufficient memorandum within the meaning of the five tests laid down by the authorities.

This disposes of that portion of plaintiff's brief in which it is argued that there are facts in the record taking the case without the statute of frauds. We are now brought to plaintiff's second contention, namely, that defendant is estopped from pleading the statute of frauds.

3. That Defendant Is Not Estopped from Pleading the Statute of Frauds.

It would appear from the frequency with which the case of *Seymour* vs. *Oelrichs* (156 Cal. 782) is cited by persons against whom the statute of frauds is pleaded, that it has become the almost universal defense of the person who insists that, notwithstanding a lack of a written memorandum, his contract may yet be enforced. In this regard counsel for

plaintiff is no exception, and they have devoted at least one-half of their argument to a discussion of that case and the cases cited by the Supreme Court of California in that case.

The facts of the Seymour case were as follows:

> "In this action the plaintiff seeks to recover the sum of $28,500 as damages for the breach of a contract of employment. He alleges that on or about the 1st day of May, 1902, the defendants Theresa A. Oelrichs and Virginia Vanderbilt, with their brother Charles L. Fair, since deceased, were the heirs at law of James G. Fair, deceased, and the owners of his estate, consisting in large part of real property in the city and county of San Francisco. It is alleged that on or about said date the said heirs of James G. Fair entered into a contract with the plaintiff whereby it was agreed that said heirs should employ the plaintiff for the period of ten years from June 1, 1902, at a salary of $300 a month, to act as overseer of their lands and the buildings thereon. On August 14, 1902, Charles L. Fair died and all of his interest in the property above mentioned devolved upon his sisters, Theresa A. Oelrichs and Virginia Vanderbilt. Plaintiff, as is averred, entered upon the performance of his duties under the aforesaid contract and continued in such employment until about the 29th day of June, 1904, when, without his consent the defendants Theresa A. Oelrichs and Virginia Vanderbilt refused to perform said contract any longer. Plaintiff has ever since been ready and willing to perform said contract upon his part.
>
> The answer denies the making of the contract as alleged and avers that plaintiff was employed by the Fair heirs from month to

month only. The Court found that all of the allegations of the complaint were true except the allegation of damage, with respect to which it found that plaintiff had been damaged in the sum of $11,500. It was further found that the contract of employment alleged by plaintiff was, in the first instance, entered into by word of mouth, but was afterwards reduced to writing subscribed by the parties to be charged thereby. The writings regarded by the Court as constituting a written memorandum or contract will be more particularly referred to hereafter. It is further found that on the 1st of May, when the original oral agreement was made, the plaintiff was holding the position of captain of detectives in the police department of the city and county of San Francisco at a salary of $250 a month; that the heirs of James G. Fair did at that time request him to give up his position as captain of detectives and assured him that if he would do so they would give him a position for ten years upon a salary of $36,000 payable in equal monthly payments of $300 and would within a short time put such employment and the terms thereof in writing and sign the same. It was upon such representations and assurance, the Court finds, that plaintiff resigned his said position as captain of detectives and took service with said heirs as alleged. There is a further finding to the effect that it is not in the power of said heirs to restore to said plaintiff his status and position as captain of detectives. The defendants Theresa A. Oelrichs and Virginia Vanderbilt have continuously failed and refused to give to plaintiff any written contract as promised. Upon these findings the Court entered judgment in favor of plaintiff and against Theresa A. Oelrichs and Virginia Vanderbilt for the sum of $11,000 with interest and costs, and said de-

fendants appeal from the judgment and from an order denying their motion for a new trial.

. . . . . .

In our discussion we shall assume, of course, that Mr. Oelrichs was duly authorized in writing to enter into such a contract on behalf of the defendants as is alleged to have been made by him with plaintiff. If he was so authorized, it is apparent that defendants are bound by his acts, conduct, and statements to the same extent that they would have been had they been personally present and personally had done just what he did. So assuming, the facts that plaintiff's evidence tended to show are substantially as follows: Plaintiff was captain of detectives in the police department of the City and County of San Francisco, at a salary of two hundred and fifty dollars per month. Under the law, he held practically a life position as captain of police, being removable therefrom only for good cause after trial. All this was known to the defendants and to Charles L. Fair, to whose property they have succeeded. Under these circumstances they offered him a position, wherein he was to render personal services in connection with their property in San Francisco for a compensation in money. The terms of the contract were finally agreed upon before Mr. Fair left for Europe, Mr. Fair acting for himself and Mr. Oelrichs representing the defendants. Plaintiff told them that he then had a life position, with a right to a pension if he remained long enough in the police department, and that he could not afford to leave the place and go into anything else unless he was certain of steady employment, and they then told him that they would give him a ten-year contract at three hundred dollars per month. This was assented to by plaintiff. The day before Mr. Fair left for Europe, to be absent a few weeks,

being very busy in closing up certain business affairs that had to be attended to before he left, he told plaintiff: 'Now, in regard to this contract, you leave that stand until I get back, and I will give you the contract.' Plaintiff asked him why it could not be done 'now,' and Fair told him not to be afraid, it would be all right, everything would be all right. It was understood that he was to go to work at once. On leaving Mr. Fair, plaintiff met Mr. Oelrichs and told him about his conversation with Fair, and Oelrichs said: 'As far as I am concerned I will give you my part of it now if you want it. I represent Mrs. Oelrichs and Mrs. Vanderbilt and there will be no trouble about it at all, but you might just as well leave it go until Fair returns,' and plaintiff said 'All right.' This was about June 1, 1902. Plaintiff relied absolutely upon the understanding that he was to have a written contract for ten years at three hundred dollars a month, and would not otherwise have resigned his position in the police department or entered the employ of the defendants and Fair. The morning Fair went away, he asked plaintiff when he was going to resign, and plaintiff said 'To-day,' and Fair said, 'All right, you go ahead, it will be all right, everything will be all right on my return.' He did resign at once and his new employment commenced June 1, 1902. Fair was killed near Paris, France, August 14, 1902, without having returned to America. Plaintiff continued to perform all services agreed to be rendered and received three hundred dollars a month therefor to July 1, 1904, when defendants, having determined to sell all their San Francisco property, discharged all of their employees, including plaintiff, and have ever since refused to recognize him as an employee or pay him any portion of the salary agreed upon.

> Plaintiff had no intimation that either Mrs. Oelrichs or Mrs. Vanderbilt did not know all about the terms upon which he entered their employ until November, 1903, when an attempt, which was not persisted in, was made to reduce his salary; Mrs. Oelrichs on November 30, 1903, told him that Mr. Oelrichs had no right to make such an arrangement. There was nothing to indicate that Mrs. Vanderbilt personally had any knowledge that plaintiff was an employee at all until after Fair's death, or that she personally knew anything about the alleged contract. It is not claimed by plaintiff that either Mr. Oelrichs or Mr. Fair did not act in perfect good faith in this matter, it being conceded that each of them fully intended to execute the written contract."

Upon the aforesaid facts the Supreme Court held that the defendants in the Seymour case were estopped from relying upon or pleading the statute of frauds.

There are three distinct differences in the facts of the Seymour case and the case at bar. The first is that in the Seymour case there was an express promise on the part of the defendant to reduce the contract to writing. There is no such express promise on the part of the defendant in this case. The second difference arises from the fact that in the discussion of the Seymour case it was assumed *"of course that Mr. Oelrichs was duly authorized in writing to enter into such a contract on behalf of the defendant as is alleged to have been made by him with plaintiff."*

Referring to the records in this case it will be seen that there is no authority proven on the part of witness Hellman to enter into any contract for the defendant herein. (See discussion in this brief under a of subdivision 2 hereof.) There is likewise no showing that Harry Lieb had any authority to bind the defendant in the contract which it is alleged he made with plaintiff. The pleadings show that the defendant is a corporation. There is absolutely no testimony in the record that fixes any authority in Harry Lieb for any purpose, with the exception of the three following statements quoted from the transcript. Witness Davis says (Trans. p. 8), "While there, I heard Mr. Harry Lieb, *the managing head of that company,* conduct a conversation over the telephone with Sidney L. Hellman." Witness Hellman says (Trans. p. 12): "I purchased this whiskey in the following manner: I spoke to Mr. Lieb, *who was the manager of the Sherwood business,* at Los Angeles. . . ." Again witness Hellman says (Trans. p. 13): *"Mr. Lieb was representing the Sherwood & Sherwood Commercial Company, of Los Angeles, in this transaction."*

There is not one word in the foregoing excerpts from the transcript which would in any way show the authority of Harry Lieb to bind the defendant herein, and therefore the very basic assumption in the discussion of *Seymour* vs. *Oelrichs* is non-existent in the record in this case.

There is a third ground of distinction between the Seymour case and the case at bar, and this is a very important distinction. In the Seymour case knowledge of the change of personal status and position of Seymour was brought home to the defendants. They promised to enter into a contract in writing, with a full knowledge that Seymour would irrevocably lose his position as captain of police in the city and county of San Francisco by accepting their offer. There is not one word in the transcript in the case at bar which shows that any knowledge was brought home to defendant herein of any intention on the part of the plaintiff to change his position or to re-sell the whiskey which it is alleged defendant had sold plaintiff. We shall show by the authorities that it is absolutely essential before the elements of estoppel can operate, that knowledge shall be brought home to the party estopped of the change in position or intended change in position on the part of the party who asserts the estoppel.

The Supreme Court had under consideration a case on hearing after a decision by the District Court of Appeals. The facts of the case were that a certain contractor who held a contract with the United States Government to carry the mail, had made an arrangement with another contractor whereby the second contractor was to assume the obligations of the first contractor with the United States Government. The agreement was not reduced to writing. The second contractor assumed the ob-

ligations of the contract with the United States Government and commenced performance thereof. After beginning performance the first contractor sold and disposed of his equipment, such as horses, vehicles, etc., and left Lassen County, wherein the contract was to be performed. Thereupon the second contractor failed to perform the contract with the Government, and the first contractor was called upon at great damage to himself to return to Lassen County, purchase new equipment and perform the mail contract. The District Court of Appeal held that the acts occasioned by the breach of the contract upon the part of the second contractor amounted to an estoppel within the doctrine of *Seymour* vs. *Oelrichs,* and prevented the plea of the statute of frauds. The Supreme Court, however, upon hearing after judgment in the District Court of Appeal, refused to accede to this position, and uses the following language in connection therewith:

> "In the District Court of Appeal it was held that the circumstances of the case were such that the defendants were estopped to set up the invalidity of the contract. This was based chiefly on the authority of *Seymour* vs. *Oelrichs,* 156 Cal. 793 (134 Am. St. Rep. 154, 106 Pac. 88). There are essential points in which the facts of that case differ from those in the case at bar. There Seymour was employed in a position for life at a good salary. This fact was *known* to the other parties and they orally agreed to employ him for a larger salary for ten years and to execute a written agreement to that effect, and they asked him to give up his life position at once and enter their service

under said agreement, which he accordingly did. He was thereby induced by them to change his condition by resigning his former position in reliance upon their agreement and promise. Their *knowledge* of the necessity of his resignation if he entered their service, and of his reliance upon their agreement as an inducement to resign, were held to be essential to the creation of an estoppel preventing them from repudiating their oral agreement and justifying the Court in enforcing it. In the case at bar, it is not alleged that it was necessary for plaintiffs or either of them to leave Susanville when they ceased to carry the mails, or that they informed defendants that they intended to change their residence or condition in any respect because of the proposed transfer, *or that the defendants had knowledge* of any such necessity or purpose. There is no evidence tending to show these facts, supposing them to have been pleaded, except the testimony of J. C. Long that he told the defendants before making the oral agreement that he had to go away because of his wife's health, and that after the agreement was made they sold two rigs and four horses and took the other equipment away 'on the strength of the agreement that we made with the defendants.' He did not say that the defendants were informed at the time of making the agreement that they intended to do this, or that they at that time had such intention, or that J. C. Long would not have gone away for the sake of his wife's health even if they had not made the agreement. There is, therefore, nothing upon which the supposed estoppel can rest."

Long vs. *Long,* 162 Cal. 427, 432.

It will be noted that the distinction between the *Seymour* case and the *Long* case is clearly based

upon the fact that in one case knowledge was brought home to the party pleading the statute of frauds, while in the other case, knowledge was not brought home.

The Appellate Courts of the State of California and of other jurisdictions have frequently commented upon the decision in *Seymour* vs. *Oelrichs,* and in many of the cases have stated the substance of the findings therein. We shall quote a few of these decisions for the purpose of illustrating the construction that the courts have placed upon the case cited.

> "The appellant strongly relies on the case of *Seymour* vs. *Oelrichs,* 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154. In that case the plaintiff Seymour sued for damages for breach of a contract of employment; his employment to cover a period of ten years. The contract was not in writing, and therefore void under the statute of frauds. The claim of estoppel was based upon the ground that the defendants when negotiating for his employment promised him a written contract, and had induced him, in order to permit him to accept the employment, to resign a life position carrying a good salary with a right to a pension upon retirement. Through circumstances arising subsequent to his entering upon his employment the written contract was not given to Seymour, and after rendering services under the verbal contract for a period of three years, he was dismissed. In holding the defendants estopped to set up the statute of frauds the Supreme Court laid emphasis upon the fact that it was not because of the rendition of services under

> the contract that the estoppel was allowed, but because of the change of position suffered by the plaintiff through having resigned a lucrative position—and which he could not now regain—in order to accept the employment. It was held that it would be a fraud upon the plaintiff if the defendants after having induced him to resign from his position upon the promise of a ten-year written contract, and having failed to reduce the contract to writing, were permitted to set up the invalidity of the oral contract to defeat recovery."
>
> *Sellers* vs. *Solway Land Co.,* 31 Cal. App. 268, 160 Pac. 175, 179.

The District Court of Appeal of the State of California in and for the second appellate district had before it in two separate hearings a case which very distinctly indicates where a line should be drawn in interpreting *Seymour* vs. *Oelrichs.* The first report of the case is found in 28 California Appellate Decisions at page 1219. Subsequently a rehearing was granted by the same Court and the final report of the case is found in 29 Cal. App. Dec. 778, and 184 Pac. 955. The title of the case is *Standing* vs. *Morosco.* The case involved a contract of employment for a period of more than one year. The plaintiff was an actor in the city of New York. He gave up his employment, sold his home and his furnishings in New York, and removed with his family to the city of Los Angeles, to accept employment from the defendant at Los Angeles. He acted upon a memorandum of a contract which the Court held to be invalid. The ques-

tion was presented to the Court as to whether there was an estoppel under the principle of *Seymour* vs. *Oelrichs*. The Court says in reference to the defense as follows:

> "In order to avoid the effect of the statute, it is appellant's position that there was such part performance of the contract shown as to raise an estoppel against respondent, preventing him from questioning the validity of the contract or its enforceability. The rule referred to is an equitable one, which holds it to be a fraud under some circumstances to permit a party to make the defense that a contract is void or unenforceable because not in writing. Every person is advised of the plain requirement of the statute, and the mere omission to insist that a writing be made, or reliance upon the unfulfilled promise of the other to put the agreement in writing, is not sufficient to protect the party insisting upon the fulfillment of the alleged contractual obligation. He must be misled by the other to his prejudice; not only must sufficient facts appear to show a representation (by words or conduct) on the part of the defendant that he did not intend to resort to a plea of the statute, but the other party must have so altered his position as that he would be made to suffer loss or unconscionable injury. If no such injury or loss is shown, the reason for the rule of estoppel fails and the excepted case is not established. See Browne on Statute of Frauds (5th Ed.) 457; *Glass* vs. *Hulbert*, 102 Mass. 24, 2 Am. Rep. 408—both cited in *Seymour* vs. *Oelrichs*, 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154."

[*Standing* vs. *Morosco*, 29 Cal. App. Dec. 778; 184 Pac. 955.

The Supreme Court of Nevada had before it on original hearing reported 184 Pacific 212 and on rehearing 185 Pacific 563, the case of *Nehls* vs. *William Stock Farming Co.,* in which there was a claim that because of certan expenditures of money on the part of the party against whom the statute of frauds had been raised, the opposing party was estopped from pleading the statute. This expenditure of money was held by the Supreme Court of Nevada, not to constitute an estoppel within the rules laid down in the Seymour case. We quote from the comments of the Court in the original hearing:

> "But counsel for respondent strenuously contend that the defendant should be estopped from pleading and urging the statute of frauds, and rely upon the case of *Seymour* vs. *Oelrichs,* 156 Cal. 782, 106 Pac. 88, 134 Am. St. Rep. 154. That was a case in which Seymour, who had a life position as captain of detectives in San Francisco, at a monthly salary of $250, entered into an oral agreement with the defendants whereby he was to resign as captain of detectives and accept a position with them for ten years at a monthly salary of $300. The defendants repudiating the contract, Seymour brought suit. The defendants pleaded the statute of frauds. The Court held that because of the fact that Seymour had been induced to give up his life position, to which he could not be reinstated, defendants' refusal to comply with the verbal agreement operated as a fraud upon the plaintiff, and sustained the plea of estoppel. The Court said:" (Here the Court quotes *in extenso* from the the *Seymour* case.)

Nehls vs. *William Stock Farming Co.*, 184 Pac. 212, 213.

It is very apparent from the authorities quoted above that the principle of an estoppel cannot operate in this case. The facts relied upon by plaintiff as proving an estoppel are only facts that amount to a breach of a contract if it were a valid contract. To adopt the position contended for by plaintiff would be to repeal the entire statute of frauds, for all that a person need do to obviate the statute of frauds would be to make a re-sale of the personal property supposed to have been purchased under the oral contract immediately upon the closing of the alleged oral contract. In effect the frauds and perjuries against which the statute was enacted would be brought into our courts without any let or hindrance if the theory of plaintiff were to prevail therein.

CONCLUSION

To briefly summarize, defendant has shown that the statute of frauds is an issue in the case under the pleadings. That Exhibits 1, 2 and 3 do not, either jointly or severally, constitute a valid memorandum under the statute. That this proposition is true,

(a) Because the authority of the agent to execute the memorandum was not in writing, as required by Section 2309 of the Civil Code.

(c) That the Exhibit Number 3 does not comply with the requirements of a valid memorandum under the statute.

That the defendant is not estopped under the doctrine of the case of *Seymour* vs. *Oelrichs* (156 Cal. 782) from pleading the statute of frauds.

We respectfully submit, therefore, that the trial Court was correct in his decision of non suit, and that Your Honorable Court should affirm the decision of the District Court herein.

Dated at San Francisco, California,
October 22, 1920.

Respectfully submitted,

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